IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEALS NO.70/99 AND 72/99

FIRST APPEAL NO.70/1999

Shri Claudio Francisco,
Remdios Marques, aged 41 year,
residing at Sanquelim, Goa. ..... Appellant.

V/s.

1. Smt. Eulalia Fernandes,
(since deceased) represented by :

1.a. Shri Shani Vaz,
r/o. Ambirna, Socorro, Bardez, Goa.

1.b. Maria Fernandes,
r/o. Ambirna Socorro, Bardez, Goa.

1.c. Ashu Fernandes,
r/o. Ambirna, Socorro, Bardez, Goa.

2. Shri Constancio Sebastiao
Aclein Fernandes, of major age,
residing at Sanquelim, Bicholim, Goa. ..... Respondents.

FIRST APPEAL NO.72/1999

Shri Claudio Francisco,
Remdios Marques, aged 41 year,
residing at Sanquelim, Goa. ..... Appellant.

V/s.

1. Smt. Belmira Fernandes,
aged 38 years, residing at
Sanquelim, Goa.

2. Shri Constancio Sebastiao
Aclein Fernandes, of major age,
residing at Sanquelim, Bicholim, Goa. ..... Respondents.

Mr. S. S. Kantak, Advocate for the appellant.

Mr. R.G. Ramani, Advocate for the respondents.

CORAM : S.A. BOBDE

DATE : 2/8 th July, 2004.

ORAL JUDGMENT :

These two first appeals No.70/99 and 72/99 can be disposed of together since they involve the same transactions and arise out of two suits which challenge the same transactions.

2. in the Village of Sanquelim, in Bicholim Taluka there is property known as “Urbano” or “Sakhayali Ali” bearing Survey No.17/1. This property was originally owned by Gregory Fernandes who was a widower. He died on 14.11.1990 leaving behind one son and three daughters. Of these children, two are involved in the present litigation, namely the daughter Eulalia and the son Constancio.

3. Within a week upon the death of Gregory, his son Constancio executed a sale deed in respect of 180 sq. metres on 21.11.1990 in favour of one Claudio Francisco Remedios Marques. Soon, thereafter, on 30.12.1990, the appellant executed another sale deed for an area of 200 sq. metres in favour of said Claudio. He appears to have sold the said property not only without consulting the other co-owners, but also his

wife, Belmira Fernandes, who admittedly, has a share in the property being his legally wedded wife.

4. There is no dispute about the fact that Gregory left behind him a piece of property i.e. Survey No.17/1 admeasuring 3950 sq. metres. Equally there is no dispute that he left behind him four heirs, each having 1/4 th share in the property which will work out to approximately 987 sq. metres. (?)

5. The son Constancio sold two plots of land by separate two sale deeds dated 21.11.1990 and 30.12.1990 respectively, totally admeasuring about 380 sq. metres. These two plots are, hereinafter, referred to as “the suit property”. These two sale deeds are under challenge. Constancio's sister Eulelia Fernandes had filed a suit being Special Civil Suit No.77/90, for a declaration that the two sale deeds are void and for a perpetual injunction restraining the defendant from interfering with the suit property. To this suit, the brother Constancio is defendant No.1 and the purchaser Shri Claudio Francisco Remedios Marques is defendant No.2. This suit has been decreed by the trial Court by a Judgment and Decree dated 2.5.1998. The trial Court has held that the plaintiff Eulalia is a co-owner of the suit property and the defendant Constancio has no exclusive right, title or interest to dispose of the property in favour of the purchaser Claudio. Incidently, the trial Court has rejected the defence of the Purchaser that he was already put

in possession of the suit plots on 2.11.1990 and 30.12.1990

6. The second suit is filed by the wife of Constancio, Belmira Fernandes who has similarly sought a declaration that the two sale deeds in favour of Claudio are void and they be cancelled. She also sought a declaration that the Deeds of Ratification and Consent dated 16.3.1995 by which she is purported to have ratified the sale in favour of Claudio, be also declared void. This suit has also been decreed by the learned Civil Judge, Sr. Division at Bicholim, who has found that Belmira, the plaintiff married to Constancio without any anti-nuptial agreement and, therefore, he has no right to transfer any assets without her consent. The learned trial Judge has also found that there is no substance in the defendant's plea that Constancio was the only heir who succeeded to the property and that his sisters have received their equivalence to their share by way of dowry. The learned trial Judge in so doing, has clearly found that the deeds of ratification dated 16.3.1995 stated to have been executed by the plaintiff Belmira are devoid, since they were executed by her during the period when she was suffering from schizophrenia, and did not understand the consequences of her acts.

7. The purchaser Claudio has preferred First Appeal No.72/99 against the Judgment and Decree dated 2.5.1998 passed in favour of Constancio's wife Belmira.

8. In this appeal, the main point that arises for determination is whether Constancio had an exclusive right to sell the unpartitioned property left behind by his father, or whether he was merely a co-owner, having no exclusive right to sell a specific portion of the property ?

9. Mr. Kantak, the learned Counsel for the purchaser Claudio submitted that the Vendor Constancio had right, title and interest to convey the suit property to Claudio, particularly having regard to the fact that he, admittedly, had a 1/4 th share in the property left behind by his father. Since the property left behind by his father admeasured 3950 sq. metres, Constancio was entitled to a 1/4 th share and, therefore, could have validly alienated approximately 987 sq. metres. Since he only alienated 380 sq. metres, the extent of property sold by me was much less than the share to which he was entitled.

10. Mr. Ramani, the learned Counsel for the plaintiff's sister, Eulalia submitted that under the Portuguese Civil Code, a co-owner who inherits a share does not have right, title and interest in a specific portion of the property which he can convey to a third person. The learned Counsel relied on Article 2177 of Portuguese Civil Code, which reads as under :

> “The co-owner, however, cannot dispose of a specific portion of the common property unless such portion is allotted to him in partition and the cession

> (Assignment) of the right to such portion which would belong to him, may be limited in conformity with the law."

The learned Counsel pointed out that this provision in the Code prohibits alienation of the property by any person unless the property has come to his share or has been assigned or allotted to him in a partition. Indeed, this is a view taken by this Court in para (9) in the case of ***Jose Antonio Philip Pascoal da Piedade Cirilo dos Milagrese Miranda and anr. vs. Joso Luis Laurente dos Milagres Miranda and ors.,*** 1999(1) Goa L.T. 77. The learned Single Judge of this Court has observed as follows :

> "Article 2177 of the said Code provides that a co-owner cannot dispose of specifically any portion of the common property without the same being assigned or allotted in partition to him. Thus, it prohibits the alienation of a property in the form of a gift by any person unless the said property exclusively belongs to the donor. In other words, a gift can be of a property or any share in a property which exclusively belongs to the donor. In case of a property which is owned by a person along with some other person or persons, it would be a case of a co-ownership of the property and in such a case, considering the provisions contained in Article 2177 of the Portuguese Civil Code, the co-owner would not be entitled to dispose of either the entire property or any specific portion of such a property unless and until the share of such a co-owner in the property is allotted, partitioned and separated in loco."

11. This view was also upheld by another learned Single Judge of this Court in ***Mr. Robert Felicio Coutinho and anr. vs. Mrs. Maria Angelica Botelho D'Souza(since deceased) represented by legal***

heirs, 2002(1) Goa L.T. 109.

12. In the present case, since the property left behind by the father Gregory, admittedly, not has been subject to partition, it must be held that Constancio was not entitled to sell any portion of such property which had not come to him in a partition. In my view, therefore, the Judgment and the Decree of the trial Court, in appeal, must be upheld and First Appeal No.70/99 is liable to be dismissed.

FIRST APPEAL NO.72/1999

13. This appeal has been filed by Claudio Francisco R. Marques against the Judgment and Decree in favour of Constancio's wife Belmira. The leaned trial Court has, in the suit filed by her, held that she had not married under an anti-nuptial agreement and she had an half share in the property under the principles of Communion of Assets and Constancio was, therefore, not entitled to effect any sale of any portion of the property without her consent. As stated earlier, it has been found that the signature on the deeds of ratification allegedly executed by her , were obtained from her while she was suffering from schizophrenia.

14. Indeed, the learned Counsel for the appellant Claudio, was not in a position to demonstrate the existence of any anti-nuptial agreement and dislodged the finding that the property was held by her under the Communion of Assets and, therefore, she had an half share in it.

15. However, the learned Counsel for the appellant submitted that the finding that on 16.3.1995 Belmira executed a deed of ratification of the sale made by her husband Constancio. According to the learned Counsel, this deed was executed infront of the Sub-Registrar and, therefore, it could not be said that Belmira ratified the sale deeds without knowing what was done.

16. Thus, the main point for determination in this appeal is whether the Deed of Ratification dated 16.3.1995 was executed by Belmira freely, of her own freewill or whether she was incapable of knowing what she was doing due to schizophrenia?

17. It is clear clear from the evidence of PW.2 D. Hegde, who treated Belmira, that she was suffering from schizophrenia and was under his care till the period between 16.3.1995 and 19.3.1995. He has stated on oath that the certificate dated 30.3.1995 to that effect was issued by him. The Doctor who is Consulting Psychiatrist, has clearly stated that on 16.3.1995, which is the date of execution of the deed of ratification, was also the date on which she was admitted to the hospital Belmira's schizophrenia was in peak of exacerbation. The Doctor stated in his evidence that during the period of acute exacerbation a patient of schizophrenia is not in touch with reality and it is only later on when she improves that she is in a position to understand the reality. The Doctor

has emphatically denied in the cross examination that Belmira suffered from a case of mild schizophrenia or paranoia. In fact, he asserted that on 16.3.1995 when he examined the patient, Belmira was non-co-operative and was not able to feed herself and was also unkempt in personal appearances. There is nothing on record which exposes the deposition of the Doctor to incredibility. Indeed, the Doctor who examined her had no motive in so deposing.

18. In support of the above, Mr. Ramani, the learned Counsel for Belmira, wife of Constancio, pointed out an application dated 7.4.1995, filed on behalf of Belmira in the Court of the Civil Judge, Sr. Division, Bicholim in this very suit. In that suit, the applicant one Neves Rodrigues, her brother had also relied on a certificate of the said Dr. Hegde and stated that it was necessary to appoint him as her guardian, on account of her mental infirmity and incapability. This application was subsequently by the applicant on 1.7.1995 when she stated to have recovered from the schizophrenia. It is significant to note that upon recovery from her ailment, Belmira, by an amendment dated 6.7.1995, for the first time challenged the ratification deeds. Thus, it is clear from the evidence on record that Belmira had an equal share in the property which could not have been alienated by her husband Constancio without her consent. It is also clear that she did not not execute the Deeds of Ratification of her own freewill and with full knowledge of what she was doing.

19. In the result, I am of the view that both the first appeals should liable to be and are, hereby, dismissed. There shall be no order as to costs.

S.A. BOBDE, J.

ssm.